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CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1944.

No. 471.

In the Matter of
VAN SWERINGEN CORPORATION, *Debtor,*
and
THE CLEVELAND TERMINALS BUILDING COMPANY,
Subsidiary Debtor.

A. B. GOCHENOUR, MEYER ABRAMS, HARRY J. MYERSON and FANNIE B. STERN,
Executrix of the Estate of Joseph L. Stern, Deceased,
Petitioners,

vs.

THE CLEVELAND TERMINALS BUILDING COMPANY, FREDERICK L. LECKIE, JOSEPH G. FOGG, and I. WALTER SHARP,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE SIXTH CIRCUIT.

BRIEF OF RESPONDENT, THE CLEVELAND TERMINALS BUILDING COMPANY, SUBSIDIARY DEBTOR.

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OPINIONS BELOW.

The very illuminating opinion of the trial Court (R. 94-99) is not published; but it so clearly sets forth the fundamentals of this case, and the reasons for the decision, that we have included it as an appendix to this brief, and we

urge the Court at this point to turn to the appendix and read the opinion. It is not long.

The findings and recommendation of the Special Master appear at R. 64-74.

The opinion of the Circuit Court of Appeals appears at 142 F. (2d) 991, and also at R. 102-110.

QUESTION PRESENTED.

The single substantial issue joined by this respondent before the Special Master and the District Court was

> "How much compensation should be allowed to petitioners?"

This was a question of fact—a problem of the evaluation of services rendered or claimed to have been rendered.

The issue in the Circuit Court of Appeals was, and the issue here is,

> "Should this Court disturb the concurrent findings made below?"

I. COUNTER-STATEMENT OF FACTS.

Subsidiary Debtor had an apparent cause of action against George and Frances Ball Foundation, *et al.*, of Muncie, Indiana, which presented considerable difficulties. The District Court of Northern Ohio appointed Frederick L. Leckie, Joseph G. Fogg and I. Walter Sharp as Special Counsel to prosecute that cause of action. Special Counsel filed suit in the United States District Court for the Southern District of Indiana, prosecuted the same and eventually obtained a settlement of Five Hundred and Fifty Thousand Dollars ($550,000.00) which was approved by the District Court of Northern Ohio and paid to the Subsidiary Debtor in cash. Paul Y. Davis, a member of the Indianapolis Bar, appeared in said suit as local counsel associated with the above-named Special Counsel.

No other counsel appeared for Subsidiary Debtor in said suit or represented Subsidiary Debtor therein; never-

theless, Meyer Abrams and Harry J. Myerson, members of the Chicago bar, and Fannie B. Stern, Executrix of the estate of Joseph L. Stern, deceased, who was a member of the Cleveland Bar, filed an application for Twenty-five Thousand Dollars ($25,000.00) of fees and One Thousand One Hundred Sixty Dollars and Sixty-two Cents ($1,160.62) of expenses in connection with alleged services contributing to said recovery.

Subsidiary Debtor believes that said recovery was obtained solely through the efforts of the Special Counsel appointed by the Court and their associate counsel in Indianapolis, also appointed by the Court, and that said counsel are entitled to all of such compensation as the Court may see fit to award for such recovery. Subsidiary Debtor is content to leave the amount of such compensation of Special Counsel to the discretion of the Court, and, therefore, this brief makes no further comment thereon.

Subsidiary Debtor also believes that Abrams, *et al.*, contributed nothing towards obtaining said recovery and rendered no services therein which were beneficial to the estate. This brief is, therefore, filed in opposition to the application of Abrams, *et al.*, and confines itself to that issue alone.

Petitioners' Statement of Facts is inaccurate in various minor points, but for the limited purposes of this brief it is unimportant to dispute concerning them.

II. SUMMARY OF ARGUMENT.

The short and simple answer to this petition is that the issue raised was a question of fact; that the Special Master and the Trial Court both found the facts against petitioners; and that the Circuit Court of Appeals, following the recognized practice, refused to disturb those findings of fact "unless clearly erroneous," and found them not only not "clearly erroneous," but clearly correct. The Circuit Court of Appeals in addition pointed out that if petitioners

be viewed in their claimed capacity of quasi-counsel for Subsidiary Debtor, then they had no authorization under General Order No. 44, and accordingly could recover no fees in that claimed capacity.

The Special Master had concluded his examination of petitioners' claim by saying,

> "In view of all of the foregoing herein it appears apparent that petitioners contributed nothing to the recovery from the Ball interests and hence should receive no compensation predicated upon said recovery." (R. 72.)

In this conclusion he had the support of the Securities and Exchange Commission of the United States which had stated in the hearing,

> "* * * we have examined the application filed by these applicants and also the record of the entire proceeding, and we fail to find any substantial support for the assumption underlying that claim." (R. 59.)

The District Court in announcing its conclusion said,

> "I * * * am satisfied that these objectors are in no position to apply for compensation; that they are not entitled to receive anything, under the facts and the law, and that no claimed ideas or acts of theirs in any conceivable way contributed to the recovery against Ball. My decision of disallowance is not based upon the theory that the objectors were volunteers, and for that reason not entitled to be compensated, but it is bottomed upon the considered judgment that the objectors contributed nothing to the recovery against Ball, and are (not*) entitled to any allowance out of the settlement of the Ball suit." (R. 97.)

The Circuit Court of Appeals refused to disturb the foregoing findings of fact and said,

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* The word "not" appears to have been inadvertently omitted from the printed record; but it will be found in its proper place as shown above in the original typewritten opinion sent up under Section 250.

"The judgment of a court of bankruptcy regarding allowances of attorneys' fees should not be disturbed on appeal unless there is a clear abuse of discretion amounting to a manifest disregard of right and reason. *Sullivan & Cromwell vs. Colorado Fuel & Iron Company,* 96 F. (2d) 219 (C. C. A. 10); *Abrams et al. v. Cleveland Terminals Building Company, supra.*" (R. 109.) *Gochenour et al. v. Cleveland Terminals Bldg. Co.,* 142 F. (2d) 991, 995.

The foregoing is sufficient to answer the entire petition, so far as it seeks to obtain fees for petitioners. For the convenience of the Court, however, we proceed to analyze the facts and arguments of petitioners as they appeared to the Special Master and the Trial Court, as disclosed by the recommendation of the former and the findings and opinion of the latter.

III. ARGUMENT.

1. APPLICABLE RULES OF LAW.

The sole issue discussed in this brief is whether or not Abrams, *et al.,* are entitled to any compensation whatever in the matter of said recovery. This question is one of which the Federal Bankruptcy Court has exclusive jurisdiction, even though the services were rendered in a plenary suit in another Court and in another jurisdiction. This principle was established in the very recent decision of the United States Supreme Court, in the case of *Brown et al. v. Gerdes et al., Trustees,* 321 U. S. 178.

The question thus at issue is one of fact. It, therefore, comes within the terms of General Order No. 47, which is made applicable to proceedings under Chapter X by General Order No. 52. General Order No. 47 provides that:

"Unless otherwise directed in the order of reference the report of a referee or of a special master shall set forth his findings of fact and conclusions of law, *and the judge shall accept his findings of fact unless clearly erroneous.* * * *" (Emphasis ours.)

The italicized part of this General Order indicates that the Special Master's findings of fact must stand unless they are clearly erroneous. The following sections of this brief will demonstrate that the Special Master's findings of fact are not clearly erroneous, but on the contrary are clearly correct. Before proceeding to that discussion, however, we wish to refer to other applicable rules of law.

General Order No. 47 is consistent with Rule 53 (e)(2) of the Federal Rules of Civil Procedure which again provides for acceptance of a Master's findings of fact "unless clearly erroneous," requiring that

> "In an action to be tried without a jury the court shall accept the master's findings of fact *unless clearly erroneous.*" (Emphasis ours.)

Article XIII of Chapter X covers the subject of "Compensation and Allowances" and prescribes the statutory rules for allowing compensation as follows:

> "Section 242. The judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred in connection with the administration of an estate in a proceeding under this chapter or in connection with a plan approved by the judge, whether or not accepted by creditors and stockholders or finally confirmed by the judge * * *."
>
> "Section 243. The judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred by creditors and stockholders, and the attorneys for any of them, in connection with the submission by them of suggestions for a plan or of proposals in the form of plans, or in connection with objections by them to the confirmation of a plan, or in connection with the administration of the estate. In fixing any such allowances, the judge shall give consideration only to the services which contributed to the plan confirmed or to the refusal of confirmation of a plan, or which were beneficial in the administration of the estate, and to the proper costs and expenses incidental thereto."

Under these provisions the only room for allowing any compensation to Abrams, *et al.*, lies in the phrase "in connection with the administration of the estate" which phrase appears in both statutes. Abrams, *et al.*, received no appointment from the Court and, therefore, may recover compensation, if at all, only as attorneys for creditors and only for services rendered "in connection with the administration of the estate." The matter against the Ball Foundation was a plenary suit against persons not connected with the estate of the bankrupt and not residents of the district, on a claim which was in existence at the time of the institution of the reorganization proceedings, and then passed to the Subsidiary Debtor in possession. It is within this narrow section of the administration of the estate that Abrams, *et al.*, as attorneys for creditors must find and point out services rendered by them "which were beneficial in the administration of the estate," if they are to establish any right to compensation herein.

If the services were not "beneficial in the administration of the estate," no compensation whatever can be paid for them. The above quoted statute sets out the circumstances under which compensation may be paid, and the only classification in which the instant case may be fitted is the one of services "which were beneficial in the administration of the estate."

When such a controversy reaches the Circuit Court of Appeals there comes into play the well-settled principle that the concurrent findings of a Special Master and of the Court below will not be set aside unless plainly erroneous.

This principle was recently reiterated by the Sixth Circuit in the case of *Abrams et al. v. Cleveland Terminals Bldg. Co.*, 136 F. 2d 537, (certiorari denied, 320 U. S. 788). The very same lawyers who are petitioners in this case were also in that case as appellants, seeking an allowance of fees of One Hundred and Seventy-two Thousand Two Hundred Dollars ($172,200.00) for legal services

in other parts of this Subsidiary Debtor's reorganization. Upon being allowed only Eighteen Thousand Dollars ($18,000.00) for legal services, they appealed. In a short per curiam opinion, the Sixth Circuit Court said:

> "(1) It is settled law, repeatedly asserted in this circuit, that the concurrent findings of the District Judge and the Master will not be set aside, unless plainly erroneous. *In re Allied Products Co.* (*Continental Casualty Company v. Harold H. Barnett, Trustee in Bankruptcy*), 6 Cir., 134 F. 2d 725, decided April 8, 1943; *Kowalsky v. American Employers Ins. Co.*, 6 Cir., 90 F. 2d 476, 480." (136 F. 2d 537, 538.)

Some of these same petitioners were also appellants in the case of *Abrams, et al., v. Scandrett, et al.*, 138 F. 2d 433 (certiorari denied, 321 U. S. 770), commonly known as the *Chicago, M., St. P. & P. R. Co.* case, wherein the Seventh Circuit Court of Appeals applied the same rule in the case of findings made by the Interstate Commerce Commission and concurred in by the District Court, saying at page 436:

> "From all the facts it is apparent that the Commission knew full well, from the record, the nature of the services rendered by each of the counsel and who had contributed anything of value to the estate. In this situation, for the District Court to have said that no substantial evidence sustains the Commission's conclusion that the services rendered contributed nothing of value would have been wholly unjustified. Nor is it for us, to examine the evidence to determine whether we would have entered the same finding * * *. The finding means merely that the services rendered contributed nothing of value to the estate."

In the case of *New Southern Ohio Gas Co. et al. v. Roush, et al.*, 138 F. 2d 411 (Certiorari denied, 321 U. S. 777), the Sixth Circuit again recently applied the same rule in the case of a referee's finding, saying that it—

> "* * * *should not be disturbed for anything less than a demonstration of plain mistake* (*Fruehauf Trailer Co.*

v. Bridge, 6 Cir., 84 F. 2d 660, 663; *Bagley v. Rowley*, 6 Cir., 127 F. 2d 139, 140)." (Emphasis ours.)

With these limitations and principles in mind, we proceed to discuss the services which Abrams, *et al.*, claim to have rendered, and the question of whether the Special Master's report and the Trial Judge's finding were "clearly erroneous" in finding that such services were in no degree "beneficial to the estate" and that Abrams, *et al.*, contributed nothing to the recovery that was made, or whether on the contrary such finding was amply supported by the evidence.

2. THE FINDINGS OF FACT BELOW WERE AMPLY SUPPORTED BY THE EVIDENCE.

The Special Master and the Trial Judge used the same language in their concurrent findings that petitioners "contributed nothing to the recovery." (R. 72 and 97.)

This finding is not "clearly erroneous." On the other hand it is supported by substantial and convincing evidence. The steps by which the Special Master arrived at this finding,* and to which he referred by his phrase "in view of all of the foregoing," and the various items of evidence in support thereof, are set forth in the remainder of this brief.

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* The trial judge adopted the Special Master's finding *in toto*. The trial judge's order entered on the journal provides in part:

"3. That the 'Interim Report and Recommendations of Special Master * * *' filed April 15, 1943, and the notices, findings, proceedings and orders concerning the same, be and the same are hereby approved, adopted and confirmed as the notices, findings, proceedings and orders of this Court."

(This order is not printed in the record but is referred to at R. 99. For full text of the order see the typewritten document sent up under Section 250).

A. Petitioners' Claim that the Idea of Bringing Suit Against the Ball Interests Was First "Conceived" by Them is Refuted by the Evidence.

In spite of the fact that petitioners took no part in filing or prosecuting the case in which the recovery was made, they nevertheless claim some of the credit for the recovery. They base this claim of credit on an assertion that they were the first to "conceive" the idea of bringing the suit. This assertion is refuted by various items of evidence, as follows:

(a) In the Testimony of October 30, 1942, testifying in respect of his investigations in Washington and elsewhere in 1936 and 1937, the witness Abrams stated that it did not then appear to petitioners "that this would give a cause of action against Midamerica or its stockholders for the profits that it made as a result of that purchase." (R. 48.)

(b) He also testified that it "came to our mind in the middle of August, 1939." (R. 48.)

(c) On November 22, 1938, Special Counsel were already studying the problem, as indicated by the itemization of services attached to their application for compensation herein which reads:

> "Conference (Messrs. Leckie, Fogg, Petersilge and Resseger) on duties of Cleveland Terminals Building Company as result of decision of Special Master restricting Midamerica claims to amounts actually paid, especially with reference to theory that Midamerica acted as Trustee and as to whether Subsidiary Debtor should file suit against Midamerica, *et al.*" (R. 7.)

The fact that Special Counsel did not file their suit against Ball until 1941 is explained by their desiring the support of the anticipated decision upholding the objections to the Midamerica claims. This decision came from the United States Circuit Court of Appeals for the Sixth Circuit on April 16, 1941,* and nine days later Special Counsel filed their application for authority to institute suit against Ball Foundation, *et al.*

Concerning that Midamerica decision, Mr. Fogg testified:

> "It handed down a very broad and sweeping opinion. That is what we had been waiting for * * *." (Transcript of October 2, 1942, page 53.**)

At the same hearing Mr. Sharp testified:

> "* * * promptly after that decision (special) counsel made an application to the District Court for authority to institute suit against the Ball Foundation, Ball and their associates, and obtained authority to do so, * * *" (R. 30.)

(d) This waiting for the Midamerica decision and this application following promptly thereafter were referable to the intention of Special Counsel as shown to the Special Master in hearings prior to March 29, 1940, and reported by him in his report bearing that date and filed on April 1, 1940, in which he stated (Petitioners' Exhibit A herein, printed record of Case No. 8708, 6th Circuit, page 39):

> "Counsel for Subsidiary Debtor have indicated that they desire to await the outcome of litigation arising out of the objections to the claims of Midamerica Corporation against Debtor and Subsidiary Debtor before taking action with respect to the proposed suit against Ball and others, and that upon final disposition of the Midamerica claims, said counsel will again apply to the Court for suitable instructions in the premises."

It, therefore, appears that Special Counsel "conceived" the idea of suit against Ball Foundation, *et al.*, not later than November 22, 1938, whereas Abrams, *et al.*, did not have the idea until August, 1939; and further that Special Counsel had formed a definite policy of withhold-

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* *In re Van Sweringen Company; The Terminal & Shaker Heights Realty Company v. The Cleveland Terminals Bldg. Company*, 119 F. 2d, 231.

** Not printed in record. See typewritten transcript sent up under Sec. 250.

ing suit, within the limits available under the Indiana six-year Statute of Limitations (Testimony of Mr. Sharp, page 38 of transcript of October 2, 1942*), until the announcement of the expected favorable decision of the reviewing Court upon the Midamerica litigation.

If petitioners' claim to be compensated, in spite of their non-participation in the suit in which recovery was made, is to rest, like that of an alleged inventor in a patent case, upon priority of conception (and we deny that priority of conception establishes any right to compensation), then petitioner has failed to establish the fact of priority.

The Special Master's recommendation and the Trial Judge's finding on this point are not only not "clearly erroneous," but are clearly correct.

B. Petitioners' Claim That Their Indiana Suit Contributed to the Recovery is Refuted by the Evidence.

Although petitioners took no part in the prosecution or settlement of the suit in which the recovery was made, and were not counsel of record or authorized by the Court to act therein, they insist that the unsuccessful suit which they filed and prosecuted in Indiana nevertheless was a contribution toward the ultimate result and that for such alleged contribution they ought to be compensated. They intimate that their Indiana suit in some way operated to prevent the running of the Statute of Limitations and that it was filed by petitioners "upon ascertaining that it was not the desire of the Subsidiary Debtor, or of the other creditors to spend any money in the prosecution of the suit." This claim is refuted by items of evidence as follows:

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* This part of the cross examination of Mr. Sharp was omitted by the appellants from their so-called printed record, without indication of any such omission. See typewritten transcript sent up under Sec. 250.

(a) Subsidiary Debtor's Exhibit 8* is a stipulation as to the respective Statutes of Limitation of Ohio and of Indiana. Summarizing, this stipulation shows that the Ohio statute provided

"* * * An action for either of the following causes, shall be brought within four years after the cause thereof accrued:

* * *

3. For relief on the ground of fraud; * * *."

On the other hand the Indiana statute provided

"The following actions shall be commenced within six (6) years after the cause of action has accrued, and not afterward: * * *

Fourth. For relief against frauds * * *."

How a suit in Ohio within the four-year statute could have operated to extend the six-year statute in Indiana has never been shown. Moreover the record of Special Counsel's suit in Indiana (in settlement of which the recovery was made) shows that the Statute of Limitations was never interposed as a defense. (Subsidiary Debtor's Exhibit 7*). The Special Counsel suit in Indiana was brought within six years and that was sufficient under the Indiana statute.

(b) Petitioners' Exhibit B, printed record of Case No. 7338, 7th Circuit, page 1, shows that their Indiana suit was filed on October 11, 1939.

Petitioners' Exhibit A, printed record of case No. 8708, 6th Circuit, page 37, shows that it was not until the following day, October 12, 1939, that the creditors' meeting was held at which, and at adjourned hearings of which, the decision was reached "that the creditors do not desire that the Subsidiary Debtor incur, at the present time, the expense of prosecuting the cause set forth in the Application for Instructions." (Petitioners' Exhibit A, printed record of case No. 8708, 6th Circuit, page 39.)

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* Not printed in record. See typewritten document sent up under Sec. 250.

It is, therefore, obvious that the written record constitutes denial of the petitioners' claim that they filed the suit "upon ascertaining" that the creditors did not desire to do so at the time named.

(c) The Abrams' petition for fees shows in its paragraph 7 that petitioners' Indiana suit was dismissed on the ground that petitioners' clients were not the proper parties plaintiff. (R. 21.)

Petitioners' Exhibit B, printed record of case No. 7338, 7th Circuit, pages 42 to 60 inclusive and especially pages 58 and 59, shows the grounds upon which Judge Baltzell held that petitioners' clients were not the proper parties plaintiff. He held that the suit was a derivative suit and could not be maintained in the absence of the corporation, to-wit, Subsidiary Debtor, to which the cause of action belonged. This decision was reached upon the motion of the defendant, Ball Foundation. (Abrams' petition, paragraph 7, R. 21.)

(d) Petitioners' Exhibit B, printed record of case No. 7338, 7th Circuit, page 8, paragraph 3, shows one item of the prayer in petitioners' Indiana suit. This item reads:

> "(3) That a receiver be appointed during the pendency of this cause to take charge of all of the property belonging to the trust estate and to hold same until the further order of the court, and upon recovery of the assets, due notice be given to all creditors for the purpose of filing claims with the receiver, so that proper distribution may be made after paying the costs of these proceedings and cost of administration."

This shows that petitioners' Indiana suit was an effort by petitioners to remove the asset from the bankruptcy court, to treat the asset as not a part of the bankruptcy estate, and to have it administered and divided under the control of a receiver appointed in a suit separate from the bankruptcy estate and in a district different from that in which the bankruptcy was pending. How to reconcile the claim that this suit contributed something to the bankruptcy estate with

the fact that it was really an effort to keep the asset out of the bankruptcy estate, has never been explained by petitioners.

Thus the Special Master's conclusion that petitioners' Indiana suit contributed nothing to the bankruptcy estate is not only not "clearly erroneous" but is in fact clearly correct. The record itself refutes petitioners' claim in this respect.

C. Petitioners' Claim That the Howe Suit Contributed Something to the Bankruptcy Estate is Likewise Refuted by the Record.

Still ignoring the fact that petitioners took no part in the suit in which recovery was made, either by way of prosecution or of negotiating settlement, petitioners claim that in some way their institution of the so-called Howe suit in the District Court of Northern Ohio contributed something toward making the recovery. This part of petitioners' claim is refuted by items of evidence as follows:

(a) The defendants in the Howe suit were not the same as the defendants in the suit in which recovery was made. Subsidiary Debtor's Exhibit 7* shows that the defendants in the complaint in that case were George A. Ball, Frank B. Bernard and George & Frances Ball Foundation. Not a single one of these defendants was a defendant in the Howe case. (Petitioners' Exhibit A, printed record of case No. 8708, 6th Circuit, page 25.) The defendants in the Howe case were Midamerica Corporation and its original officers and directors, Bradley, Anzalone, Tomlinson and Murphy. How a suit against the one group could have contributed anything towards a recovery from the other group is not shown.

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* Transcript of record of Subsidiary Debtor's Indiana suit against Ball Foundation—not printed in the record. See original document sent up under Sec. 250.

(b) The Special Master's Report (R. 71) and the Subsidiary Debtor's Exhibit 31* show that the Howe suit was voluntarily dismissed by plaintiffs. This dismissal followed upon a report made by the Special Master acting in his capacity as an examiner in which he stated that

"* * * counsel appear satisfied that a further prosecution of the Howe case, in view of the pendency of the (Special Counsel's) case against Ball, and others, in the Indiana Court, cannot be productive of any substantial results, and that it is to the best interests of the estate that said Howe case be dismissed. Your Examiner concurs in such conclusions." (R. 46.)

It seems superfluous to point out that a case which was voluntarily dismissed by plaintiffs, and in which the defendants were not those who eventually paid the money that was recovered, could not possibly have contributed anything toward the recovery.

(c) The theory upon which the Howe suit was based was not the theory upon which recovery was made.

Petitioners' Exhibit B, printed record in case No. 7338, 7th Circuit, pages 18 to 24 inclusive, sets out the complaint in the Howe case. It was founded upon the theory of actual fraud and active bad faith. (Note the allegations concerning conspiracy and collusion on page 21, in paragraph 8, and the allegations concerning collusion and concealment on page 23 in paragraph 11.)

On the other hand the suit under which recovery was actually made was brought on the theory of constructive trust and a required accounting for profits. (See Subsidiary Debtor's Exhibit 7** and the complaint therein set forth.)

The Special Master's finding as to the Howe suit that "petitioners' services in connection therewith do not ap-

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* Notice of dismissal of Howe suit—not printed in record. See document sent up under Sec. 250.

** Not printed in record. See document sent up under Sec. 250.

pear compensable" (R. 70) is amply supported by the evidence that the suit could not possibly have contributed anything; for it was not against the parties who could or did eventually make payment, it was voluntarily dismissed by the petitioners, and it was brought on a different theory from that upon which the recovery was made. The Special Master's finding, therefore, is not merely not "clearly erroneous," but is obviously correct.

D. The Transactions Incident to Petitioners' Efforts to Have Subsidiary Debtor Made a Party to the Howe Suit Contributed Nothing of Benefit to the Estate.

Again, seeking compensation for alleged services outside of the prosecution and settlement of the suit upon which recovery was made and in which petitioners took no part, they assert a benefit to the estate in connection with their petition for clarification, which appears in Petitioners' Exhibit A, printed record of case No. 8708, 6th Circuit, pages 48 to 50. This claim is overthrown by items of evidence as follows:

(a) The opinion of United States Circuit Court of Appeals for the Sixth Circuit constitutes refutation of this claim. The opinion appears under the title *Gochenour, et al., v. Cleveland Terminals Bldg. Co.,* 118 F. 2d, 89, and it confirms the Special Master and the District Court in their refusal to permit petitioners to make Subsidiary Debtor a party to the Howe case. It then proceeds to suggest the appointment of an examiner to investigate petitioners' suggestions that causes of action existed which were being ignored.

(b) The examiner's reports appear as Subsidiary Debtor's Exhibits 19 and 20 (R. 42-46). These reports of the Special Master, acting as examiner upon appointment pursuant to such suggestion of the Circuit Court, disclosed that said matters had already had the attention of the District Court and the Special Master.

(c) The District Court adopted said reports (Subsidiary Debtor's Exhibit 21*) and petitioners then voluntarily dismissed the Howe suit (Subsidiary Debtor's Exhibit 31*) and their Common Pleas Court case against the directors and officers of Subsidiary Debtor (Subsidiary Debtor's Exhibit 2, last page, item of October 21, 1941*).

(d) At the time of petitioners' argument before the Circuit Court, they knew that

> "The matters set forth in allegation 'a' (of their Common Pleas Court petition against Subsidiary Debtor's officers and directors) have (had) been previously examined into herein in connection with the objections of Gochenour, *et al.*, to the claim of J. P. Morgan & Company, filed in these proceedings." (R. 43.)

for petitioners had been counsel for Gochenour in said matter, *A. B. Gochenour, et al. v. J. P. Morgan & Co.*, 111 F. 2d, 378.

(e) At the time of the argument in the Circuit Court petitioners also knew that

> "The matters set forth in allegation 'b' were examined into and resulted in the realization of $240,000.00 for the benefit of the estate of Subsidiary Debtor herein." (R. 43.)

for petitioners were then active in the hearings in this proceeding in which said recovery was made.

(f) At the time of the hearing in the Circuit Court petitioners knew that

> "The matters alleged in allegations 'c,' 'd,' 'e,' 'f' 'g' and 'h' were made the subject of inquiry and included in the Interim Report of the Special Master filed December 31, 1936, * * *" (R. 43).

for petitioners were then counsel in these proceedings.

(g) At said time petitioners also knew that this Court had appointed Special Counsel in 1937 to pro-

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* Not printed in record. See original document sent up under Sec. 250.

tect the interest of Subsidiary Debtor in connection with claims against The Higbee Company; for petitioners were then counsel active in these proceedings. The same was true in the matter of the extension agreement of June 1, 1932, when made the subject of consideration by the Special Master. (R. 43).

(h) Petitioners at said time must also have known that

> "* * * counsel for Subsidiary Debtor (had) filed its proof of claim in The Higbee Company reorganization, pending in this Court, claiming certain assets which had been acquired from Midamerica Corporation, or its successors, by the defendants Bradley and Murphy, named in the Howe case aforesaid." (R. 45.)

(i) From their extensive investigations petitioners must also have known that the defendants Anzalone and Tomlinson named in said Howe case had made no profit from the Midamerica transactions. They must also have known that Midamerica's remaining assets were negligible in value. (R. 45 and Subsidiary Debtor's Exhibit 9, being copies of newspaper articles dated early in 1937, reporting the sale of Midamerica Corporation to George A. Ball and associates.)

The foregoing items of evidence give ample support to the Special Master's finding that petitioners' claim of having benefited the estate in respect of their petition for clarification was such that "The record does not appear to bear out this allegation." (R. 70.) Here again the record makes it impossible for petitioners to show that the Special Master's finding was "clearly erroneous." On the contrary the record shows that the Special Master's finding was absolutely correct.

At the hearing before Judge Jones, Appellants placed great reliance upon their so-called "Exhibit H" (R. 60-64) as indicating that they had thereby furnished the basis for the suit against Ball Foundation and the necessary facts therefor as early as October, 1937; and that Special Counsel

had used these facts and theories in preparing and prosecuting the suit and making the recovery thereon. However, Special Counsel each separately denied under oath having known anything of Exhibit H until too late for use in the Ball suit. The fact is that the information contained in Exhibit H had been elicited in the hearings before the Interstate Commerce Committee of the United States Senate, had been printed and published by that committee, and had been so sensational that they were widely copied and discussed in the daily newspapers at the time. As evidence of that wide public knowledge and discussion Appellee offered in evidence before the Special Master its Exhibit 9* which consisted of many excerpts from newspaper articles of December 9, 1936, and thereafter up to and including April 11, 1937. They may be found as the last exhibit contained in the binder of Appellee's exhibits above referred to. Objection was made to their reception in evidence; but they were admitted in spite of such objection. Their admission was obviously proper; for they were offered not to establish the factual matter therein contained, but merely to show the wide publicity given to the story which they purported to set forth.

Thus petitioners at this hearing before the District Judge hung their case upon the slender thread of their Exhibit H; but the testimony showed that Special Counsel had not known of its existence and that the facts had been available to them from other sources. This hearing before the District Judge, therefore, has the effect of confirming the findings made by the Special Master and concurred in by the District Court.

The record, therefore, establishes that the findings were amply supported by substantial evidence, and under the well-settled law expressed by the Sixth Circuit Court in

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* Not printed in Record. See typewritten documents sent up under Sec. 250.

Abrams, et al. v. Cleveland Terminals Bldg. Co., 136 F. 2d 537 (Certiorari denied, 320 U. S. 788), and *New Southern Ohio Gas Co., et al. v. Roush, et al.*, 138 F. 2d 411 (Certiorari denied, 321 U. S. 777), both of which are quoted at page 8 above, those findings, being the concurrent findings of the District Court and the Special Master, will not be disturbed by a reviewing court.

IV. CONCLUSION.

Shortly stated, therefore, the situation is shown to be that Special Counsel prepared the case in which the recovery was made, prosecuted the same and achieved a settlement; that petitioners took no part therein; that petitioners' claim for compensation resolved itself into a claim for something like a finder's fee, which of course is not recognizable in this sort of proceeding; that petitioners, however, in fact were not even the finders of the cause of action; that extensive newspaper publicity (Subsidiary Debtor's Exhibit 9*) and the published results of the Senate investigation had already made public property of the facts which petitioners claim they discovered; that these facts had also been specifically called to the attention of the Special Master by government investigators (R. 54, 55, 57, 58); that the possibilities of recovery became evident to all parties in these proceedings after the results of the case known as *A. B. Gochenour, et al., v. J. P. Morgan & Co.*, 111 F. 2d, 378 and *The Terminal & Shaker Heights Realty Company (formerly Midamerica Corporation) v. Cleveland Terminals Bldg. Company*, 119 F. 2d, 231; that compensation for petitioners' services in those cases, to the extent they rendered any service or were entitled to any fees, has already been awarded (decision of Judge Jones in this proceeding evi-

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denced by opinion* filed August 21, 1942, and order** entered August 27, 1942, affirmed by the Circuit Court in its case No. 9425 under date of May 31, 1943, 136 F. 2d, 537, certiorari denied, 320 U. S. 788); that petitioners repeatedly attempted to prosecute actions for the pursuit of which the District Court had appointed others as Special Counsel; and that the detailed analysis set forth above shows that petitioners contributed no benefit to the administration of the estate for which compensation has not already been awarded and particularly no benefit in the matter of the recovery from Ball Foundation, *et al.*

This question of whether the petitioners contributed anything towards the recovery from Ball Foundation, *et al.*, is a question of *fact*. The Special Master's finding thereon is a *finding of fact*. Findings of fact by a Special Master, concurred in by the District Court, are adopted by reviewing courts "unless clearly erroneous." The Special Master's recommendations and the Trial Judge's findings of fact in this matter are not "erroneous" in any degree, clearly or otherwise. On the contrary, every one of them is supported either by petitioners' own admissions, or by the written records of the case, as detailed above.

In the light of the statutes providing the circumstances under which compensation may be paid and in the light of the requirement that the findings of fact below must stand "unless clearly erroneous" and of the showing above that each finding of fact is amply supported by the several items of evidence, it is submitted that the Sixth Circuit's refusal to disturb the Special Master's report and the decision of the District Court, in respect of the petition of Abrams, *et al.* were correct, that no compensation whatever

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* See pp. 205-207 of printed record of Case No. 9425, 6th Circuit, filed herein.

** See pp. 208-213 of printed record of Case No. 9425, 6th Circuit, filed herein.

should be allowed to them, and that the present petition should be denied.

Respectfully submitted,

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Of Counsel.